

Ben F. Pierce Gore (SBN 128515)  
 PRATT & ASSOCIATES  
 1901 S. Bascom Avenue, Suite 350  
 Campbell, CA 95008  
 Telephone: (408) 429-6506  
 Fax: (408) 369-0752  
[pgore@prattattorneys.com](mailto:pgore@prattattorneys.com)

(Co-counsel listed on signature page)

*Attorneys for Plaintiff*

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RICHARD W. WIERING  
 CLERK, U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

**CV 12-02272**

**PSG**

JUDE TRAZO, individually and on behalf  
 of all others similarly situated,

Plaintiff,

v.

NESTLÉ USA, INC. and  
 NESTLÉ HOLDINGS, INC.,

Defendants.

Case No.

**CLASS ACTION AND REPRESENTATIVE  
 ACTION**

**COMPLAINT FOR DAMAGES,  
 EQUITABLE AND INJUNCTIVE RELIEF**

**JURY TRIAL DEMANDED**

Plaintiff, through his undersigned attorneys, brings this lawsuit against Defendants as to his own acts upon personal knowledge and as to all other matters upon information and belief. In order to remedy the harm arising from Defendants' illegal conduct, which has resulted in unjust profits, Plaintiff brings this action on behalf of a nationwide class of consumers who, within the last four years, purchased Nestlé "Coffee-Mate" powder coffee creamer labeled "0g Trans Fat" but which also states on the label that the product contains more than 4 grams of saturated fat or 13 grams of fat per 50 grams (referred to herein as "Misbranded Food Products").

## INTRODUCTION

1  
2 1. Every day, millions of Americans purchase and consume packaged foods.  
3 Identical federal and California laws require truthful, accurate information on the labels of  
4 packaged foods. This case is about companies that flout those laws. The law is clear: misbranded  
5 food cannot legally be manufactured, held, advertised, distributed or sold. Misbranded food is  
6 worthless as a matter of law, and purchasers of misbranded food are entitled to a refund of their  
7 purchase price.

8 2. Defendants have pursued a "Nutrition, Health, and Wellness strategy" based on  
9 their "assessment that nutritional awareness and the desire for improved health and wellness will  
10 increasingly drive consumer choice." [www.Nestlé.com/CSV/Nutrition/Pages/Nutrition.aspx](http://www.Nestlé.com/CSV/Nutrition/Pages/Nutrition.aspx).

11 3. Pursuant to this strategy, Defendants stated that they would "renovate products for  
12 nutrition and health considerations" which would lead to "value" including "brand awareness and  
13 recognition; consumer loyalty, long-term enhanced growth, market share and profitability." *Id.*

14 4. Defendants' key to achieving this is to convince consumers that they can "use  
15 Nestlé Products (like candy, chocolate, frozen pizza, *etc.*) as part of a healthy and enjoyable diet."  
16 *Id.* As made clear in the 2010 Nestlé Annual Report, "[e]ach of our product categories, from  
17 Chocolate to Baby Food, has a specific strategy to ensure that it can be the nutrition leader in its  
18 space," and "Nestlé's Food and Beverage business has ... the know-how ... to bring nutrition,  
19 health and wellness arguments to all food and beverage categories." 2010 Nestlé Annual Report  
20 at 12, 18.

21 5. Recognizing that "[t]he success of the Nestlé Group depends on its ability ... to  
22 offer high-quality products that appeal to the consumer preferences," *id.* at p. 36, Defendants have  
23 repositioned their food products as healthy, nutritious and natural by making false and deceptive  
24 claims in violation of federal and California laws that govern the types of representations that can  
25 be made on food labels.

26 6. As part of this nutrition, health and wellness strategy, Defendants make a number  
27 of claims about their products. Defendants' reason for doing so was driven by their pecuniary  
28 interests.

1           7. If a manufacturer is going to make a claim on a food label, the label must meet  
2 certain legal requirements that help consumers make informed choices and ensure that they are  
3 not misled. As described more fully below, Defendants have made, and continue to make, false  
4 and deceptive claims in violation of federal and California laws that govern the types of  
5 representations that can be made on food labels. These laws recognize that reasonable consumers  
6 are likely to choose products claiming to have a health or nutritional benefit over otherwise  
7 similar food products that do not claim such benefits. More importantly, these laws recognize  
8 that the failure to disclose the presence of risk-increasing nutrients is deceptive because it  
9 conveys to consumers the net impression that a food makes only positive contributions to a diet,  
10 or does not contain any nutrients at levels that raise the risk of diet-related disease or health-  
11 related condition.

12           8. For example, Nestlé Original Coffee-Mate improperly makes a "0g Trans Fat"  
13 nutrient content claim despite containing 0.5 grams of saturated fat per 2 grams or more than 12  
14 grams of saturated fat per 50 grams. This level of saturated fat bars the making of a nutrient  
15 content claim without a disclosure statement. The front label of the Coffee-Mate original flavor  
16 states:



27           9. The back of this same label states that the product contains over 0.5 grams of  
28 saturated fat per serving size. However, the serving size utilized is only 2 grams. Thus on a per

1 50 gram basis the product is well over the 4 gram saturated fat limit without the required  
2 disclosure mandated by law, although that fact is not obvious to the consumer and requires more  
3 than one mathematical calculation to figure out. These same unlawful nutrient content claims are  
4 on each label of the Misbranded Food Products.

5 10. Because of the saturated fat content of the Misbranded Food Products, pursuant to  
6 federal and California law, Defendants must include a warning statement adjacent to their trans  
7 fat and cholesterol nutrient claims that informs consumers of the high levels of fat, saturated fat,  
8 cholesterol or sodium. No such disclosure statement currently exists on these products.  
9 Therefore, they are misbranded as a matter of federal and California law and cannot be sold  
10 because they are legally worthless.

11 11. Identical federal and California laws regulate the content of labels on packaged  
12 food. The requirements of the federal Food Drug & Cosmetic Act, 21 U.S.C. § 301, *et seq.*  
13 ("FDCA") were adopted by the California legislature in the Sherman Food Drug & Cosmetic Law  
14 (the "Sherman Law"). California Health & Safety Code § 109875, *et seq.* Under FDCA section  
15 403(a), food is "misbranded" if "its labeling is false or misleading in any particular," or if it does  
16 not contain certain information on its label or its labeling. 21 U.S.C. § 343(a).

17 12. Under the FDCA, the term "false" has its usual meaning of "untruthful," while the  
18 term "misleading" is a term of art. Misbranding reaches not only false claims, but also those  
19 claims that might be technically true, but still misleading. If any one representation in the  
20 labeling is misleading, the entire food is misbranded, nor can any other statement in the labeling  
21 cure a misleading statement. "Misleading" is judged in reference to "the ignorant, the unthinking  
22 and the credulous who, when making a purchase, do not stop to analyze." *United States v. El-O-*  
23 *Pathic Pharmacy*, 192 F.2d 62, 75 (9<sup>th</sup> Cir. 1951). Under the FDCA, it is not necessary to prove  
24 that anyone was actually misled.

25 13. In promoting the health benefits of their Misbranded Food Products, Defendants  
26 have made, and continue to make, false and deceptive claims on their Misbranded Food Products  
27 in violation of federal and California laws that govern the types of representations that can be  
28 made on food labels. In particular, in making their unlawful "0 grams Trans Fat" and

1 “Cholesterol Free” nutrient content claims on their Misbranded Food Products, Defendants have  
2 violated nutrient content labeling regulations mandated by federal and California law which  
3 require a disclosure of nutrients (fat, saturated fat, cholesterol, and sodium) present in a food at a  
4 level that the FDA has concluded increases the risk of diet-related disease or health-related  
5 condition, required whenever a nutrient content claim is made.

6 14. Defendants have made, and continue to make, unlawful nutrient content claims on  
7 food labels of their Misbranded Food Products that are prohibited by federal and California law  
8 and which render these products misbranded. Under federal and California law, Defendants’  
9 Misbranded Food Products cannot legally be manufactured, advertised, distributed, held or sold.  
10 Defendants’ false and misleading labeling practices stem from their global marketing strategy.  
11 Thus, the violations and misrepresentations are similar across product labels and product lines.

12 15. Defendants’ violations of law are numerous and include: (1) the illegal  
13 advertising, marketing, distribution, delivery and sale of misbranded Defendants’ Misbranded  
14 Food Products to consumers in the United States; (2) the failure to properly disclose the high  
15 levels of saturated fat in their Misbranded Food Products on the Misbranded Food Products’  
16 packaging and labeling as required by law; and (3) the failure to include statements on the  
17 Misbranded Food Products packaging and labeling that are mandated by law.

#### 18 PARTIES

19 16. Plaintiff is a resident of San Jose, California who purchased Defendants’  
20 Misbranded Food Products in California during the four (4) years prior to the filing of this  
21 Complaint (the “Class Period”).

22 17. Defendant Nestlé USA, Inc. (“Nestlé USA”) is a privately held Delaware  
23 corporation with its corporate headquarters and principal place of business in Glendale,  
24 California. It is owned by Defendant Nestlé Holdings.

25 18. Defendant Nestlé Holdings, Inc. (“Nestlé Holdings”) is a privately held Delaware  
26 corporation with its principal place of business in Glendale, California. Nestlé USA is 100%  
27 owned by Nestlé Holdings. The Chairman, CEO and President of Nestlé Holdings is California-  
28 based Bradley Alford, who holds the same titles for Nestlé USA. The California-based CFO of

1 Nestlé Holdings is the CFO of Nestlé USA. The California-based Secretary of Nestlé Holdings is  
2 the Secretary of Nestlé USA.

3 19. Defendants are leading producers of retail food products, including Misbranded  
4 Food Products. They sell their food products to consumers through grocery and other retail stores  
5 throughout California and the United States.

6 20. California law applies to all claims set forth in this Complaint because Nestlé USA  
7 and Nestlé Holdings are residents of California and all of the misconduct alleged herein was  
8 contrived in, implemented in, and has a shared nexus with California. The formulation and  
9 execution of the unlawful practices alleged herein, occurred in, or emanated from California.  
10 Accordingly, California has significant contacts and/or a significant aggregation of contacts with  
11 the claims asserted by Plaintiff and all Class members.

#### 12 JURISDICTION AND VENUE

13 21. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d)  
14 because this is a class action in which: (1) there are over 100 members in the proposed class;  
15 (2) members of the proposed class have a different citizenship from Defendants; and (3) the  
16 claims of the proposed class members exceed \$5,000,000 in the aggregate.

17 22. The Court has jurisdiction over the federal claim alleged herein pursuant to 28  
18 U.S.C. § 1331, because it arises under the laws of the United States.

19 23. The Court has jurisdiction over the California claims alleged herein pursuant to 28  
20 U.S.C. § 1367, because they form part of the same case or controversy under Article III of the  
21 United States Constitution.

22 24. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to  
23 28 U.S.C. § 1332, because the matter in controversy exceeds the sum or value of \$75,000, and is  
24 between citizens of different states.

25 25. The Court has personal jurisdiction over Defendants because a substantial portion  
26 of the wrongdoing alleged in this Complaint occurred in California, Defendants are authorized to  
27 do business in California, have sufficient minimum contacts with California, and otherwise  
28 intentionally avail themselves of the markets in California through the promotion, marketing and



1 sale of merchandise, sufficient to render the exercise of jurisdiction by this Court permissible  
2 under traditional notions of fair play and substantial justice.

3 26. Because a substantial part of the events or omissions giving rise to these claims  
4 occurred in this District and because the Court has personal jurisdiction over Defendants, venue is  
5 proper in this Court pursuant to 28 U.S.C. § 1391(a) and (b).

### 6 **FACTUAL ALLEGATIONS**

#### 7 **A. Identical California And Federal Laws Regulate Food Labeling**

8 27. Food manufacturers are required to comply with identical federal and state laws  
9 and regulations that govern the labeling of food products. First and foremost among these is the  
10 FDCA and its labeling regulations, including those set forth in 21 C.F.R. § 101.

11 28. Pursuant to the Sherman Law, California has expressly adopted the federal  
12 labeling requirements as its own and indicated that “[a]ll food labeling regulations and any  
13 amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993,  
14 or adopted on or after that date shall be the food regulations of this state.” California Health &  
15 Safety Code § 110100.

16 29. In addition to its blanket adoption of federal labeling requirements, California has  
17 also enacted a number of laws and regulations that adopt and incorporate specific enumerated  
18 federal food laws and regulations. For example, food products are misbranded under California  
19 Health & Safety Code § 110660 if their labeling is false and misleading in one or more  
20 particulars; are misbranded under California Health & Safety Code § 110665 if their labeling fails  
21 to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and  
22 regulations adopted thereto; are misbranded under California Health & Safety Code § 110670 if  
23 their labeling fails to conform with the requirements for nutrient content and health claims set  
24 forth in 21 U.S.C. § 343(r) and regulations adopted thereto; are misbranded under California  
25 Health & Safety Code § 110705 if words, statements and other information required by the  
26 Sherman Law to appear on their labeling are either missing or not sufficiently conspicuous; are  
27 misbranded under California Health & Safety Code § 110735 if they are represented as having  
28 special dietary uses but fail to bear labeling that adequately informs consumers of their value for

1 that use; and are misbranded under California Health & Safety Code § 110740 if they contain  
2 artificial flavoring, artificial coloring and chemical preservatives but fail to adequately disclose  
3 that fact on their labeling.

4 **B. FDA Enforcement History**

5 30. In recent years the FDA has become increasingly concerned that food  
6 manufacturers were disregarding food labeling regulations. To address this concern, the FDA  
7 elected to take steps to inform the food industry of its concerns and to place the industry on notice  
8 that food labeling compliance was an area of enforcement priority.

9 31. In October 2009, the FDA issued a *Guidance For Industry: Letter regarding Point*  
10 *Of Purchase Food Labeling* to address its concerns about front of package labels ("2009 FOP  
11 Guidance"). The 2009 FOP Guidance advised the food industry:

12 FDA's research has found that with FOP labeling, people are less likely to check  
13 the Nutrition Facts label on the information panel of foods (usually, the back or  
14 side of the package). It is thus essential that both the criteria and symbols used in  
15 front-of-package and shelf-labeling systems be nutritionally sound, well-designed  
16 to help consumers make informed and healthy food choices, and not be false or  
17 misleading. The agency is currently analyzing FOP labels that appear to be  
18 misleading. The agency is also looking for symbols that either expressly or by  
19 implication are nutrient content claims. We are assessing the criteria established by  
20 food manufacturers for such symbols and comparing them to our regulatory  
21 criteria.

22 It is important to note that nutrition-related FOP and shelf labeling, while currently  
23 voluntary, is subject to the provisions of the Federal Food, Drug, and Cosmetic  
24 Act that prohibit false or misleading claims and restrict nutrient content claims to  
25 those defined in FDA regulations. Therefore, FOP and shelf labeling that is used in  
26 a manner that is false or misleading misbrands the products it accompanies.  
27 Similarly, a food that bears FOP or shelf labeling with a nutrient content claim that  
28 does not comply with the regulatory criteria for the claim as defined in Title 21  
Code of Federal Regulations (CFR) 101.13 and Subpart D of Part 101 is  
misbranded. We will consider enforcement actions against clear violations of these  
established labeling requirements. . .

... Accurate food labeling information can assist consumers in making healthy  
nutritional choices. FDA intends to monitor and evaluate the various FOP labeling  
systems and their effect on consumers' food choices and perceptions. FDA  
recommends that manufacturers and distributors of food products that include FOP  
labeling ensure that the label statements are consistent with FDA laws and  
regulations. FDA will proceed with enforcement action against products that bear  
FOP labeling that are explicit or implied nutrient content claims and that are not



1 consistent with current nutrient content claim requirements. FDA will also proceed  
2 with enforcement action where such FOP labeling or labeling systems are used in a  
3 manner that is false or misleading.

4 32. The 2009 FOP Guidance recommended that “manufacturers and distributors of  
5 food products that include FOP labeling ensure that the label statements are consistent with FDA  
6 law and regulations” and specifically advised the food industry that it would “proceed with  
7 enforcement action where such FOP labeling or labeling systems are used in a manner that is  
8 false or misleading.”

9 33. Despite the issuance of the 2009 FOP Guidance, Defendant did not remove the  
10 unlawful and misleading food labeling claims from their Misbranded Food Products.

11 34. On March 3, 2010, the FDA issued an “Open Letter to Industry from [FDA  
12 Commissioner] Dr. Hamburg” (hereinafter, “Open Letter”). The Open Letter reiterated the FDA’s  
13 concern regarding false and misleading labeling by food manufacturers. In pertinent part the letter  
14 stated:

15 In the early 1990s, the Food and Drug Administration (FDA) and the food  
16 industry worked together to create a uniform national system of nutrition labeling,  
17 which includes the now-iconic Nutrition Facts panel on most food packages. Our  
18 citizens appreciate that effort, and many use this nutrition information to make  
19 food choices. Today, ready access to reliable information about the calorie and  
20 nutrient content of food is even more important, given the prevalence of obesity  
21 and diet-related diseases in the United States. This need is highlighted by the  
22 announcement recently by the First Lady of a coordinated national campaign to  
23 reduce the incidence of obesity among our citizens, particularly our children.

24 With that in mind, I have made improving the scientific accuracy and usefulness  
25 of food labeling one of my priorities as Commissioner of Food and Drugs. The  
26 latest focus in this area, of course, is on information provided on the principal  
27 display panel of food packages and commonly referred to as “front-of-pack”  
28 labeling. The use of front-of-pack nutrition symbols and other claims has grown  
tremendously in recent years, and it is clear to me as a working mother that such  
information can be helpful to busy shoppers who are often pressed for time in  
making their food selections. ...

As we move forward in those areas, I must note, however, that there is one area in  
which more progress is needed. As you will recall, we recently expressed  
concern, in a “Dear Industry” letter, about the number and variety of label claims  
that may not help consumers distinguish healthy food choices from less healthy  
ones and, indeed, may be false or misleading.

1 At that time, we urged food manufacturers to examine their product labels in the  
2 context of the provisions of the Federal Food, Drug, and Cosmetic Act that  
3 prohibit false or misleading claims and restrict nutrient content claims to those  
4 defined in FDA regulations. As a result, some manufacturers have revised their  
5 labels to bring them into line with the goals of the Nutrition Labeling and  
6 Education Act of 1990. Unfortunately, however, we continue to see products  
7 marketed with labeling that violates established labeling standards.

8 To address these concerns, FDA is notifying a number of manufacturers that their  
9 labels are in violation of the law and subject to legal proceedings to remove  
10 misbranded products from the marketplace. While the warning letters that convey  
11 our regulatory intentions do not attempt to cover all products with violative labels,  
12 they do cover a range of concerns about how false or misleading labels can  
13 undermine the intention of Congress to provide consumers with labeling  
14 information that enables consumers to make informed and healthy food choices.  
15 For example:

- 16 • Nutrient content claims that FDA has authorized for use on foods for  
17 adults are not permitted on foods for children under two. Such claims are  
18 highly inappropriate when they appear on food for infants and toddlers  
19 because it is well known that the nutritional needs of the very young are  
20 different than those of adults.
- 21 • Claims that a product is free of trans fats, which imply that the product is a  
22 better choice than products without the claim, can be misleading when a  
23 product is high in saturated fat, and especially so when the claim is not  
24 accompanied by the required statement referring consumers to the more  
25 complete information on the Nutrition Facts panel.
- 26 • Products that claim to treat or mitigate disease are considered to be drugs  
27 and must meet the regulatory requirements for drugs, including the  
28 requirement to prove that the product is safe and effective for its intended  
use.
- Misleading "healthy" claims continue to appear on foods that do not meet  
the long- and well-established definition for use of that term.
- Juice products that mislead consumers into believing they consist entirely  
of a single juice are still on the market. Despite numerous admonitions  
from FDA over the years, we continue to see juice blends being  
inaccurately labeled as single-juice products.

23 These examples and others that are cited in our warning letters are not indicative  
24 of the labeling practices of the food industry as a whole. In my conversations  
25 with industry leaders, I sense a strong desire within the industry for a level  
26 playing field and a commitment to producing safe, healthy products. That  
27 reinforces my belief that FDA should provide as clear and consistent guidance as  
28 possible about food labeling claims and nutrition information in general, and  
specifically about how the growing use of front-of-pack calorie and nutrient  
information can best help consumers construct healthy diets.

I will close with the hope that these warning letters will give food manufacturers

1 further clarification about what is expected of them as they review their current  
2 labeling. I am confident that our past cooperative efforts on nutrition information  
3 and claims in food labeling will continue as we jointly develop a practical,  
4 science-based front-of-pack regime that we can all use to help consumers choose  
5 healthier foods and healthier diets.

6 35. Notwithstanding the Open Letter, Defendants continued to utilize unlawful food  
7 labeling claims despite the express guidance of the FDA in the Open Letter.

8 36. In addition to its guidance to industry, the FDA has sent warning letters to  
9 industry, including many of Defendants' peer food manufacturers for the same types of unlawful  
10 nutrient content claims described above.

11 37. In these letters the FDA indicated that, as a result of the same type of claims  
12 utilized by Defendants, products were in "violation of the Federal Food, Drug, and Cosmetic Act  
13 ... and the applicable regulations in Title 21, Code of Federal Regulations, Part 101 (21 CFR §  
14 101)" and "misbranded within the meaning of section 403(r)(1)(A) because the product label  
15 bears a nutrient content claim but does not meet the requirements to make the claim."

16 38. The warning letters were hardly isolated as the FDA has issued other warning  
17 letters to other companies for the same type of food labeling claims at issue in this case.

18 39. The FDA stated that the agency not only expected companies that received  
19 warning letters to correct their labeling practices but also anticipated that other firms would  
20 examine their food labels to ensure that they are in full compliance with food labeling  
21 requirements and make changes where necessary. Defendants did not change the labels on its  
22 Misbranded Food Products in response to these warning letters.

23 40. Defendant also continued to ignore the 2009 FOP Guidance which detailed the  
24 FDA's guidance on how to make food labeling claims. Defendants ignored this guidance as well  
25 and continued to utilize unlawful claims on the labels of their Misbranded Food Products. As  
26 such, the Defendants' Misbranded Food Products continue to run afoul of 2009 FOP Guidance as  
27 well as federal and California law.  
28

41. Despite the FDA's numerous warnings to industry, Defendants have continued to sell products bearing unlawful food labeling claims without meeting the requirements to make them.

42. Plaintiff did not know, and had no reason to know, that the Defendants' Misbranded Food Products were misbranded and bore food labeling claims despite failing to meet the requirements to make those food labeling claims.

**C. Defendants' Food Products Are Misbranded**

43. Pursuant to Section 403 of the FDCA, a claim that characterizes the level of a nutrient in a food is a "nutrient content claim" that must be made in accordance with the regulations that authorize the use of such claims. 21 U.S.C. § 343(r)(1)(A). California expressly adopted the requirements of 21 U.S.C. § 343(r) in § 110670 of the Sherman Law.

44. Nutrient content claims are claims about specific nutrients contained in a product. They are typically made on the front of packaging in a font large enough to be read by the average consumer. Because these claims are relied upon by consumers when making purchasing decisions, the regulations govern what claims can be made in order to prevent misleading claims.

45. Section 403(r)(1)(A) of the FDCA governs the use of expressed and implied nutrient content claims on labels of food products that are intended for sale for human consumption. *See* 21 C.F.R. § 101.13.

46. 21 C.F.R. § 101.13 provides the general requirements for nutrient content claims, which California has expressly adopted. *See* California Health & Safety Code § 110100. 21 C.F.R. § 101.13 requires that manufacturers include certain disclosures when a nutrient claim is made and, at the same time, the product contains unhealthy components, such as fat, saturated fat, cholesterol and sodium at levels that the FDA has concluded increases the risk of diet-related disease or health related condition. It also sets forth the manner in which that disclosure must be made, as follows:

(4)(i) The disclosure statement "See nutrition information for \_\_\_\_ content" shall be in easily legible boldface print or type, in distinct contrast to other printed or graphic matter, and in a size no less than that required by §101.105(i) for the net quantity of contents statement, except where the size of the claim is less than two times the required size of the net quantity of contents statement, in which case the

disclosure statement shall be no less than one-half the size of the claim but no smaller than one-sixteenth of an inch, unless the package complies with §101.2(c)(2), in which case the disclosure statement may be in type of not less than one thirty-second of an inch.

(ii) The disclosure statement shall be immediately adjacent to the nutrient content claim and may have no intervening material other than, if applicable, other information in the statement of identity or any other information that is required to be presented with the claim under this section (e.g., see paragraph (j)(2) of this section) or under a regulation in subpart D of this part (e.g., see §§101.54 and 101.62). If the nutrient content claim appears on more than one panel of the label, the disclosure statement shall be adjacent to the claim on each panel except for the panel that bears the nutrition information where it may be omitted.

47. An “expressed nutrient content claim” is defined as any direct statement about the level (or range) of a nutrient in the food (e.g., “low sodium” or “contains 100 calories”). See 21 C.F.R. § 101.13(b)(1).

48. An “implied nutrient content claim” is defined as any claim that: (i) describes the food or an ingredient therein in a manner that suggests that a nutrient is absent or present in a certain amount (e.g., “high in oat bran”); or (ii) suggests that the food, because of its nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim or statement about a nutrient (e.g., “healthy, contains 3 grams (g) of fat”). 21 C.F.R. § 101.13(b)(2)(i-ii).

#### **D. Defendants Make Unlawful “0g Trans Fat” Nutrient Content Claims**

49. To appeal to consumer preferences, Defendants have repeatedly made unlawful nutrient content claims on products containing disqualifying levels of fat, saturated fat, cholesterol or sodium. These nutrient content claims were unlawful because they have failed to include disclosure statements required by law that are designed to inform consumers of the inherently unhealthy nature of those products in violation of 21 C.F.R. § 101.13(h), which has been incorporated in California’s Sherman Law.

50. 21 C.F.R. § 101.13 (h)(1) provides that:

If a food ... contains more than 13.0 g of fat, 4.0 g of saturated fat, 60 milligrams (mg) of cholesterol, or 480 mg of sodium per reference amount customarily consumed, per labeled serving, or, for a food with a reference amount customarily consumed of 30 g or less ... per 50 g ... then that food must bear a statement disclosing that the nutrient exceeding the specified level is present in the food as follows: “See nutrition information for \_\_\_ content” with the blank filled in with



1 the identity of the nutrient exceeding the specified level, e.g., "See nutrition  
2 information for fat content."

3 51. Defendants repeatedly violate this provision. Defendants' Misbranded Food  
4 Products' packaging prominently makes "0 grams Trans Fat" claims despite disqualifying levels  
5 of saturated fat that far exceed the 4 gram disclosure threshold.

6 52. Pursuant to 21 C.F.R. § 101.13(h), Defendants are prohibited from making the  
7 unqualified nutrient claims of "0 grams Trans Fat" on their food products if their products contain  
8 fat in excess of 13 grams, saturated fat in excess of 4 grams, cholesterol in excess of 60  
9 milligrams, or sodium in excess of 480mg per 50 grams, unless the product also displays a  
10 disclosure statement that informs consumers of the product's fat, saturated fat and sodium levels.

11 53. These regulations are intended to ensure that consumers are not misled to believe  
12 that a product that claims, for instance, to be low in trans fat, but actually has other unhealthy fat  
13 levels, is a healthy choice, because of the lack of trans fats.

14 54. Nevertheless, Defendants' product labels state that the product contains "0 grams  
15 Trans Fat" without such a disclosure even though their Misbranded Food Products contain  
16 saturated fat in excess of the 4 gram level that the FDA has concluded increases the risk of a diet-  
17 related disease or health-related condition.

18 55. Based on the fat, saturated fat, cholesterol and sodium content of Defendants'  
19 products, pursuant to federal and California law, Defendants must include a warning statement  
20 adjacent to the trans fat nutrient claim that informs consumers of the high levels of fat, saturated  
21 fat, cholesterol or sodium. No such disclosure statement currently exists on Defendants'  
22 Misbranded Food Products. Therefore, they are misbranded as a matter of federal and California  
23 law and cannot be sold because they are legally worthless.

24 56. In addition to its guidance to industry, the FDA has sent warning letters to the  
25 industry, including Defendants' subsidiaries and many of Defendants' peer food manufacturers,  
26 for the same types of unlawful 0 grams trans fat nutrient content claims described above. In these  
27 letters the FDA indicated that as a result of the same type of 0 gram trans fat claims utilized by  
28 Defendants, products were in "violation of the Federal Food, Drug, and Cosmetic Act ... and the



1 applicable regulations in Title 21, Code of Federal Regulations, Part 101 (21 CFR 101)” and  
2 “misbranded within the meaning of section 403 because the product label bears a nutrient content  
3 claim but does not meet the requirements to make the claim.”

4 57. The warning letters were hardly isolated, as the FDA has issued at least nine other  
5 warning letters to other companies for the same type of unlawful 0 grams trans fat nutrient  
6 content claims at issue in this case.

7 58. Despite the FDA’s numerous warnings to industry, Defendants have continued to  
8 sell products bearing unlawful “0 grams Trans Fat” nutrient content claims without meeting the  
9 requirements to make them.

10 59. Plaintiff did not know, and had no reason to know, that Defendants’ Misbranded  
11 Food Products were misbranded, and bore nutrient claims despite failing to meet the requirements  
12 to make those nutrient claims. Plaintiff was equally unaware that Defendants’ Misbranded Food  
13 Products contained one or more nutrients like total fat at levels in the food that, according to the  
14 FDA, “may increase the risk of disease or health related condition that is diet related.” Plaintiff  
15 and members of the Class who purchased the Misbranded Food Products paid an unwarranted  
16 premium for these products.

17 **D. Defendants Have Violated California Law**

18 60. Defendants have violated California Health & Safety Code § 110390 which makes  
19 it unlawful to disseminate false or misleading food advertisements that include statements on  
20 products and product packaging or labeling or any other medium used to directly or indirectly  
21 induce the purchase of a food product.

22 61. Defendants have violated California Health & Safety Code § 110395 which makes  
23 it unlawful to manufacture, sell, deliver, hold or offer to sell any falsely advertised food.

24 62. Defendants have violated California Health & Safety Code §§ 110398 and 110400  
25 which make it unlawful to advertise misbranded food or to deliver or proffer for delivery any  
26 food that has been falsely advertised.

1           63. Defendants have violated California Health & Safety Code § 110660 because their  
2 labeling is false and misleading in one or more ways, as follows:

3           a. Defendants' Misbranded Food Products are misbranded under California  
4 Health & Safety Code § 110665 because their labeling fails to conform to the requirements for  
5 nutrient labeling set forth in 21 U.S.C. § 343(q) and the regulations adopted thereto;

6           b. Defendants' Misbranded Food Products are misbranded under California  
7 Health & Safety Code § 110670 because their labeling fails to conform with the requirements for  
8 nutrient content and health claims set forth in 21 U.S.C. § 343(r) and the regulations adopted  
9 thereto; and

10           c. Defendants' Misbranded Food Products are misbranded under California  
11 Health & Safety Code § 110705 because words, statements and other information required by the  
12 Sherman Law to appear on their labeling either are missing or not sufficiently conspicuous.

13           64. Defendants have violated California Health & Safety Code § 110760 which makes  
14 it unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is  
15 misbranded.

16           65. Defendants' Misbranded Food Products are misbranded under California Health &  
17 Safety Code § 110755 because they purport to be or are represented for special dietary uses, and  
18 their labels fail to bear such information concerning their vitamin, mineral, and other dietary  
19 properties as the Secretary determines to be, and by regulations prescribes as, necessary in order  
20 fully to inform purchasers as to its value for such uses.

21           66. Defendants have violated California Health & Safety Code § 110765 which makes  
22 it unlawful for any person to misbrand any food.

23           67. Defendants have violated California Health & Safety Code § 110770 which makes  
24 it unlawful for any person to receive in commerce any food that is misbranded or to deliver or  
25 proffer for deliver any such food.

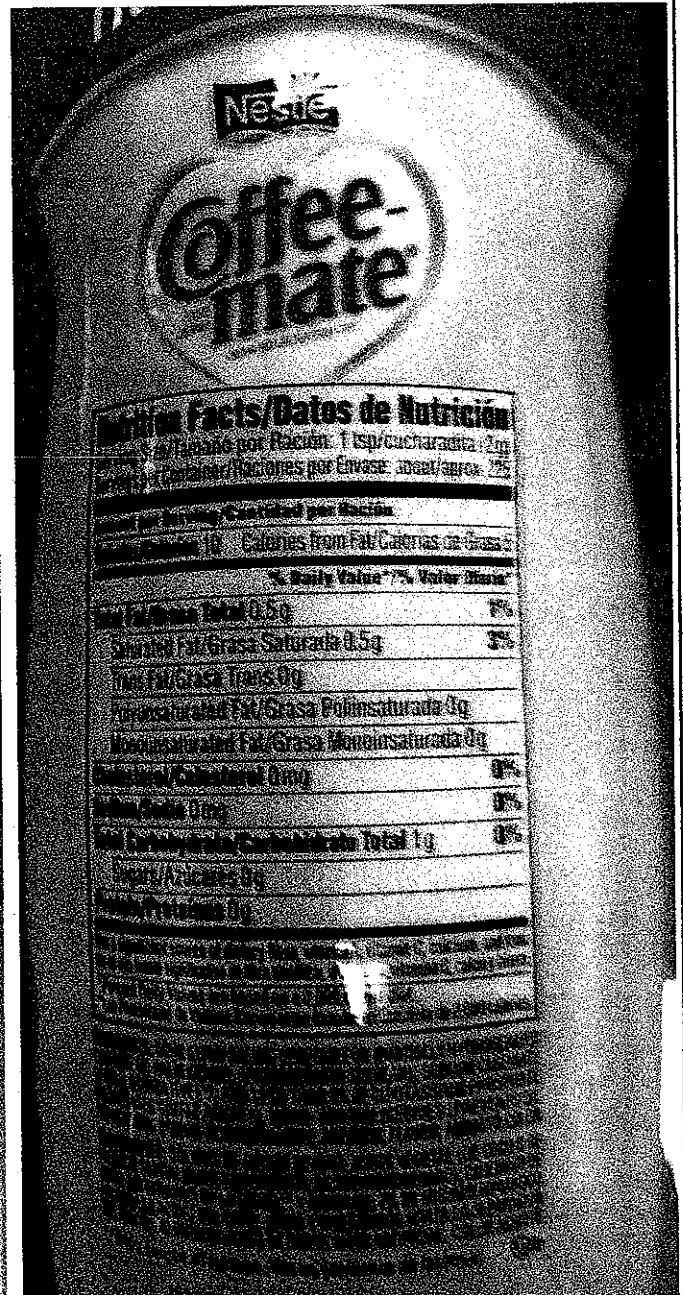
26           68. Defendants have violated the standard set by 21 C.F.R. § 101.13(h), which has  
27 been incorporated by reference in the Sherman Law, by failing to include on their product labels  
28 the nutritional information required by law.

**E. Plaintiff Purchased Defendants' Misbranded Food Products**

69. Plaintiff cares about the nutritional content of food and seeks to maintain a healthy diet.

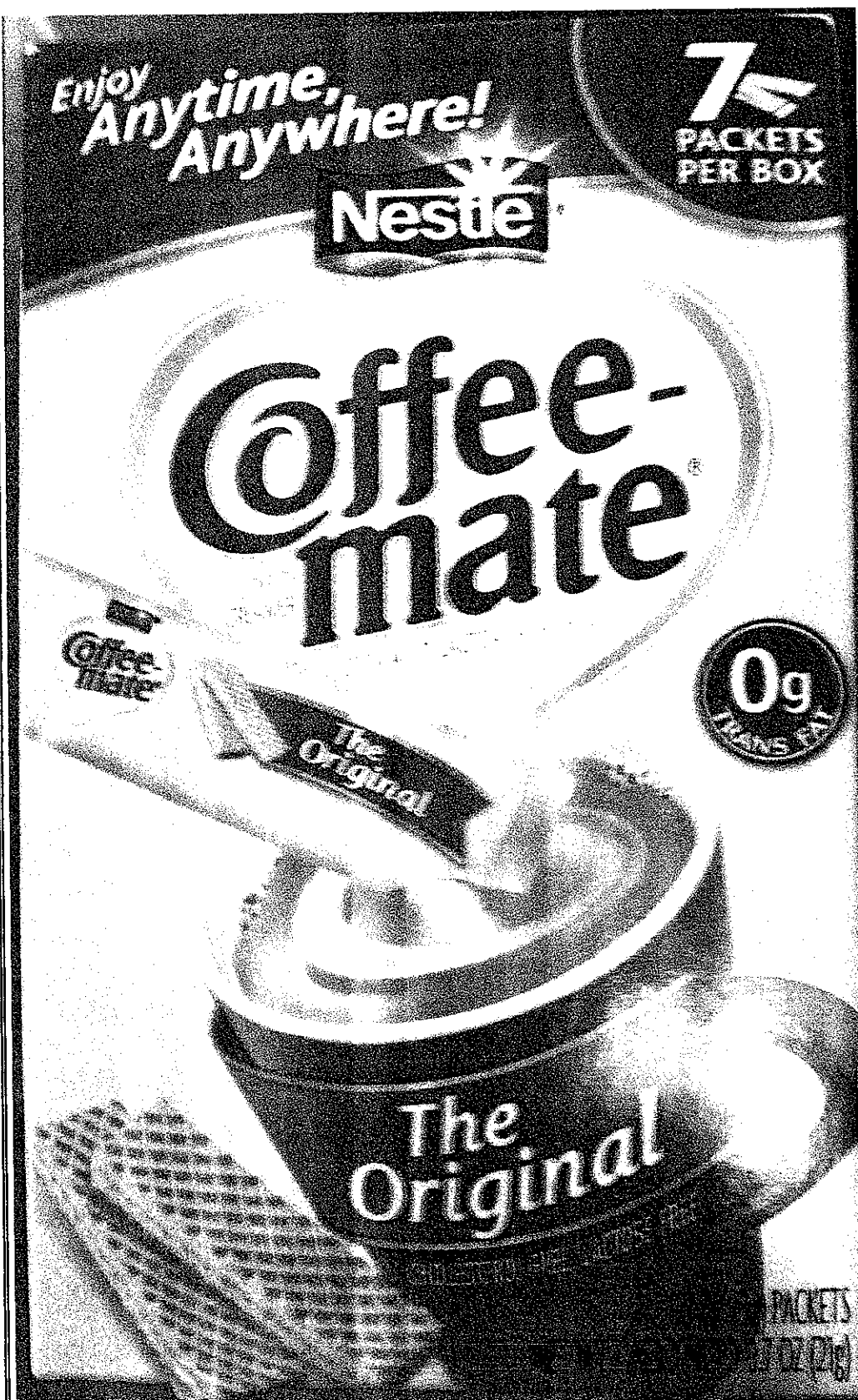
70. Plaintiff purchased Defendants' Misbranded Food Products on occasions during the Class Period. Plaintiff purchased:

The Original Coffee-mate





1 The Original Coffee-mate Packets





# Coffee-mate®



## Nutrition Facts/Datos de Nutrición

Serving Size/Tamaño por Ración: 1 packet/paquete (3 g)  
Servings per Container/Raciones por Envase 7

Amount per Serving/Cantidad por Ración	
<b>Calories/Calorías</b> 15	<b>Calories from Fat/Calorías de Grasa</b> 10
% Daily Value*/% Valor Diario*	
<b>Total Fat/Grasa Total</b> 1g	<b>2%</b>
Saturated Fat/Grasa Saturada 1g	<b>5%</b>
Trans Fat/Grasa Trans 0g	
Polyunsaturated Fat/Grasa Poliinsaturada 0g	
Monounsaturated Fat/Grasa Monoinsaturada 0g	
<b>Cholesterol/Colesterol</b> 0mg	<b>0%</b>
<b>Sodium/Sodio</b> 0mg	<b>0%</b>
<b>Total Carbohydrate/Carbohidrato Total</b> 1g	<b>0%</b>
Sugars/Azúcares 0g	
<b>Protein/Proteínas</b> 0g	

Not a significant source of dietary fiber, vitamin A, vitamin C, calcium, and iron.  
 No es una fuente significativa de fibra dietética, vitamina A, vitamina C, calcio y hierro.

\*Percent Daily Values are based on a 2,000 calorie diet.  
 \*Los Porcentajes de Valores Diarios están basados en una dieta de 2,000 calorías.

SINCE 1866



QUESTIONS?  
¿PREGUNTAS?

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 Hora del Este  
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NESTLÉ® AND  
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ARE REGISTERED  
TRADEMARKS OF  
SWISS CONDENSED MILK CO.  
NESTLÉ SA, VEVEY,  
SWITZERLAND



**INGREDIENTS:** CORN SYRUP SOLIDS, VEGETABLE OIL (PARTIALLY HYDROGENATED COCONUT OR PALM KERNEL, HYDROGENATED SOYBEAN), SODIUM CASEINATE (A MILK DERIVATIVE)\*\* AND LESS THAN 2% OF DIPOTASSIUM PHOSPHATE (MODERATES COFFEE ACIDITY), MONO- AND DIGLYCERIDES (PREVENTS OIL SEPARATION), SODIUM ALUMINOSILICATE, ARTIFICIAL FLAVOR, ANNATTO COLOR.

**INGREDIENTES:** SÓLIDOS DE JARABE DE MAÍZ, ACEITE VEGETAL (DE COCO O DE PALMISTE PARCIALMENTE HIDROGENADO, DE SOYA HIDROGENADO), CASEINATO DE SODIO (UN DERIVADO DE LA LECHE)\*\* Y MENOS DEL 2% DE FOSFATO DIPOTÁSICO (MODERA LA ACIDEZ DEL CAFÉ), MONO Y DIGLICÉRIDOS (EVITA LA SEPARACIÓN DEL ACEITE), ALUMINOSILICATO DE SODIO, SABOR ARTIFICIAL, COLOR ACHIOTE.

\*\*Not a source of lactose./No es una fuente de lactosa.

DISTRIBUTED BY / DISTRIBUIDO POR: NESTLÉ USA, INC., GLENDALE, CA 91203 USA

THIS PRODUCT IS NON-DAIRY, LACTOSE-FREE AND CHOLESTEROL-FREE. 43147581



1           71. Plaintiff read the labels on Defendants' Misbranded Food Products, including the  
2 "0 grams Trans Fat" nutrient content label, before purchasing them. Defendants' failure to  
3 disclose the presence of risk-increasing nutrients in connection with its "0 grams Trans Fat"  
4 nutrient content claim was deceptive because it falsely conveyed to the Plaintiff the net  
5 impression that the Misbranded Food Products he bought made only positive contributions to a  
6 diet, and did not contain any nutrients at levels that raised the risk of diet-related disease or  
7 health-related condition.

8           72. Plaintiff relied on Defendants' package labeling including the "0 grams Trans Fat"  
9 nutrient content claim, and based and justified the decision to purchase Defendants' products in  
10 substantial part on Defendants' package labeling including the "0 grams Trans Fat" nutrient  
11 content claim.

12           73. At point of sale, Plaintiff did not know, and had no reason to know, that  
13 Defendants' products were misbranded as set forth herein, and would not have bought the  
14 products had he known the truth about them.

15           74. At point of sale, Plaintiff did not know, and had no reason to know, that  
16 Defendants' "0 grams Trans Fat" nutrient content claim was unlawful and unauthorized as set  
17 forth herein, and would not have bought the products absent the unlawful "0 grams Trans Fat"  
18 nutrient content claim.

19           75. As a result of Defendants unlawful "0 grams Trans Fat" nutrient content claims,  
20 Plaintiff and thousands of others in California purchased the Misbranded Food Products at issue.

21           76. Defendants' labeling, advertising and marketing as alleged herein are false and  
22 misleading and were designed to increase sales of the products at issue. Defendants'  
23 misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a  
24 reasonable person would attach importance to Defendants' misrepresentations in determining  
25 whether to purchase the products at issue.

26           77. A reasonable person would also attach importance to whether Defendants'  
27 products were legally salable, and capable of legal possession, and to Defendants' representations  
28 about these issues in determining whether to purchase the products at issue. Plaintiff would not



1 have purchased Defendants' Misbranded Food Products had he known they were not capable of  
2 being legally sold or held.

### 3 CLASS ACTION ALLEGATIONS

4 78. Plaintiff brings this action as a class action pursuant to Federal Rule of Procedure  
5 23(b)(2) and 23(b)(3) on behalf of the following class:

6 All persons in the United States who, within the last four years, purchased Nestlé  
7 "Coffee-Mate" powder coffee creamer labeled "0g Trans Fat" but which also  
8 states on the label that the product contains more than 4 grams of saturated fat or  
9 13 grams of fat per 50 grams (the "Class").

10 79. The following persons are expressly excluded from the Class: (1) Defendants and  
11 their subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from  
12 the proposed Class; (3) governmental entities; and (4) the Court to which this case is assigned and  
13 its staff.

14 80. This action can be maintained as a class action because there is a well-defined  
15 community of interest in the litigation and the proposed Class is easily ascertainable.

16 81. Numerosity: Based upon Defendants' publicly available sales data with respect to  
17 the misbranded products at issue, it is estimated that the Class numbers in the thousands, and that  
18 joinder of all Class members is impracticable.

19 82. Common Questions Predominate: This action involves common questions of law  
20 and fact applicable to each Class member that predominate over questions that affect only  
21 individual Class members. Thus, proof of a common set of facts will establish the right of each  
22 Class member to recover. Questions of law and fact common to each Class member include, just  
23 for example:

- 24 a. Whether Defendants engaged in unlawful, unfair or deceptive business  
25 practices by failing to properly package and label their Misbranded Food  
26 Products sold to consumers;
- 27 b. Whether the food products at issue were misbranded as a matter of law;
- 28 c. Whether Defendants made unlawful and misleading nutrient content  
claims with respect to their food products sold to consumers;
- d. Whether Defendants violated California Bus. & Prof. Code § 17200, *et seq.*, California Bus. & Prof. Code § 17500 *et seq.*, the Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, and the Sherman Law;

- 1 e. Whether Plaintiff and the Class are entitled to equitable and/or injunctive relief;
- 2 f. Whether Defendants' unlawful, unfair and/or deceptive practices harmed Plaintiff and the Class; and
- 3 g. Whether Defendants were unjustly enriched by their deceptive practices.

4  
5 83. Typicality: Plaintiff's claims are typical of the claims of the Class because  
6 Plaintiff bought Defendants' Misbranded Food Products during the Class Period. Defendants'  
7 unlawful, unfair and/or fraudulent actions concern the same business practices described herein  
8 irrespective of where they occurred or were experienced. Plaintiff and the Class sustained similar  
9 injuries arising out of Defendants' conduct in violation of California law. The injuries of each  
10 member of the Class were caused directly by Defendants' wrongful conduct. In addition, the  
11 factual underpinning of Defendants' misconduct is common to all Class members and represents  
12 a common thread of misconduct resulting in injury to all members of the Class. Plaintiff's claims  
13 arise from the same practices and course of conduct that give rise to the claims of the Class  
14 members and are based on the same legal theories.

15 84. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class.  
16 Neither Plaintiff nor Plaintiff's counsel have any interests that conflict with or are antagonistic to  
17 the interests of the Class members. Plaintiff has retained highly competent and experienced class  
18 action attorneys to represent his interests and those of the members of the Class. Plaintiff and  
19 Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate  
20 this class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the Class  
21 members and will diligently discharge those duties by vigorously seeking the maximum possible  
22 recovery for the Class.

23 85. Superiority: There is no plain, speedy or adequate remedy other than by  
24 maintenance of this class action. The prosecution of individual remedies by members of the  
25 Class will tend to establish inconsistent standards of conduct for Defendants and result in the  
26 impairment of Class members' rights and the disposition of their interests through actions to  
27 which they were not parties. Class action treatment will permit a large number of similarly  
28

1 situated persons to prosecute their common claims in a single forum simultaneously, efficiently  
 2 and without the unnecessary duplication of effort and expense that numerous individual actions  
 3 would engender. Further, as the damages suffered by individual members of the Class may be  
 4 relatively small, the expense and burden of individual litigation would make it difficult or  
 5 impossible for individual members of the Class to redress the wrongs done to them, while an  
 6 important public interest will be served by addressing the matter as a class action. Class  
 7 treatment of common questions of law and fact would also be superior to multiple individual  
 8 actions or piecemeal litigation in that class treatment will conserve the resources of the Court and  
 9 the litigants, and will promote consistency and efficiency of adjudication.

10 86. The prerequisites to maintaining a class action for injunctive or equitable relief  
 11 pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendants have acted or refused to act on grounds  
 12 generally applicable to the Class, thereby making appropriate final injunctive or equitable relief  
 13 with respect to the Class as a whole.

14 87. The prerequisites to maintaining a class action pursuant to Fed. R. Civ. P. 23(b)(3)  
 15 are met as questions of law or fact common to class members predominate over any questions  
 16 affecting only individual members, and a class action is superior to other available methods for  
 17 fairly and efficiently adjudicating the controversy.

18 88. Plaintiff and Plaintiff's counsel are unaware of any difficulties that are likely to be  
 19 encountered in the management of this action that would preclude its maintenance as a class  
 20 action.

## 21 **CAUSES OF ACTION**

### 22 **FIRST CAUSE OF ACTION**

#### 23 **Business and Professions Code § 17200, *et seq.*** 24 **Unlawful Business Acts and Practices**

25 89. Plaintiff incorporates by reference each allegation set forth above.

26 90. Defendants' conduct constitutes unlawful business acts and practices.

27 91. Defendants sold Misbranded Food Products in California and the United States  
 28 during the Class Period.

1           92. Defendants are corporations and, therefore, each is a "person" within the meaning  
2 of the Sherman Law.

3           93. Defendants' business practices are unlawful under § 17200, *et seq.* by virtue of  
4 Defendants' violations of the advertising provisions of Article 3 of the Sherman Law and the  
5 misbranded food provisions of Article 6 of the Sherman Law.

6           94. Defendants' business practices are unlawful under § 17200, *et seq.* by virtue of  
7 Defendants' violations of § 17500, *et seq.*, which forbids untrue and misleading advertising.

8           95. Defendants' business practices are unlawful under § 17200, *et seq.* by virtue of  
9 Defendants' violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*

10          96. Defendants sold Plaintiff and the Class Misbranded Food Products that were not  
11 capable of being sold or held legally, and which were legally worthless.

12          97. As a result of Defendants' illegal business practices, Plaintiff and the Class,  
13 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future  
14 conduct and such other orders and judgments which may be necessary to disgorge Defendants'  
15 ill-gotten gains and to restore to any Class Member any money paid for the Misbranded Food  
16 Products.

17          98. Defendants' unlawful business acts present a threat and reasonable continued  
18 likelihood of injury to Plaintiff and the Class. Plaintiff and the Class paid a premium price for the  
19 Misbranded Food Products.

20          99. As a result of Defendants' conduct, Plaintiff and the Class, pursuant to Business  
21 and Professions Code § 17203, are entitled to an order enjoining such future conduct by  
22 Defendants, and such other orders and judgments which may be necessary to disgorge  
23 Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Food  
24 Products by Plaintiff and the Class.

25                                   **SECOND CAUSE OF ACTION**  
26                                   **Business and Professions Code § 17200, *et seq.***  
                                      **Unfair Business Acts and Practices**

27          100. Plaintiff incorporates by reference each allegation set forth above.  
28

101. Defendants' conduct as set forth herein constitutes unfair business acts and practices.

102. Defendants sold Misbranded Food Products in California and the United States during the Class Period.

103. Plaintiff and members of the Class suffered a substantial injury by virtue of buying Defendants' Misbranded Food Products that they would not have purchased absent Defendants' illegal conduct.

104. Defendants' deceptive marketing, advertising, packaging and labeling of their Misbranded Food Products and their sale of unsalable misbranded products that were illegal to possess was of no benefit to consumers, and the harm to consumers and competition is substantial.

105. Defendants sold Plaintiff and the Class Misbranded Food Products that were not capable of being legally sold or held and that were legally worthless.

106. Plaintiff and the Class who purchased Defendants' Misbranded Food Products had no way of reasonably knowing that the products were misbranded and were not properly marketed, advertised, packaged and labeled, and thus could not have reasonably avoided the injury each of them suffered.

107. The consequences of Defendants' conduct as set forth herein outweigh any justification, motive or reason therefor. Defendants' conduct is and continues to be immoral, unethical, unscrupulous, contrary to public policy, and is substantially injurious to Plaintiff and the Class. Plaintiff and the Class paid a premium price for the Misbranded Food Products.

108. As a result of Defendants' conduct, Plaintiff and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Food Products by Plaintiff and the Class.

**THIRD CAUSE OF ACTION**  
**Business and Professions Code § 17200, *et seq.***  
**Fraudulent Business Acts and Practices**

109. Plaintiff incorporates by reference each allegation set forth above.

110. Defendants' conduct as set forth herein constitutes fraudulent business practices under California Business and Professions Code sections § 17200, *et seq.*

111. Defendants sold Misbranded Food Products in California and the United States during the Class Period.

112. Defendants' misleading marketing, advertising, packaging and labeling of the Misbranded Food Products and misrepresentation that the products were salable, capable of possession and not misbranded were likely to deceive reasonable consumers, and in fact, Plaintiff and members of the Class were deceived. Defendants have engaged in fraudulent business acts and practices.

113. Defendants' fraud and deception caused Plaintiff and the Class to purchase Defendants Misbranded Food Products that they would otherwise not have purchased had they known the true nature of those products.

114. Defendants sold Plaintiff and the Class Misbranded Food Products that were not capable of being sold or held legally and that were legally worthless. Plaintiff and the Class paid a premium price for the Misbranded Food Products.

115. As a result of Defendants' conduct as set forth herein, Plaintiff and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Food Products by Plaintiff and the Class.

**FOURTH CAUSE OF ACTION**  
**Business and Professions Code § 17500, *et seq.***  
**Misleading and Deceptive Advertising**

116. Plaintiff incorporates by reference each allegation set forth above.



1           117. Plaintiff asserts this cause of action for violations of California Business and  
2 Professions Code § 17500, *et seq.* for misleading and deceptive advertising against Defendants.

3           118. Defendants sold Misbranded Food Products in California and the United States  
4 during the Class Period.

5           119. Defendants engaged in a scheme of offering Defendants Misbranded Food  
6 Products for sale to Plaintiff and members of the Class by way of, *inter alia*, product packaging  
7 and labeling, and other promotional materials. These materials misrepresented and/or omitted the  
8 true contents and nature of Defendants Misbranded Food Products. Defendants' advertisements  
9 and inducements were made within California and come within the definition of advertising as  
10 contained in Business and Professions Code §17500, *et seq.* in that such product packaging and  
11 labeling, and promotional materials were intended as inducements to purchase Defendants'  
12 Misbranded Food Products and are statements disseminated by Defendants to Plaintiff and the  
13 Class that were intended to reach members of the Class. Defendants knew, or in the exercise of  
14 reasonable care should have known, that these statements were misleading and deceptive as set  
15 forth herein.

16           120. In furtherance of their plan and scheme, Defendants prepared and distributed  
17 within California and nationwide via product packaging and labeling, and other promotional  
18 materials, statements that misleadingly and deceptively represented the composition and the  
19 nature of Defendants' Misbranded Food Products. Plaintiff and the Class necessarily and  
20 reasonably relied on Defendants' materials, and were the intended targets of such representations.

21           121. Defendants' conduct in disseminating misleading and deceptive statements in  
22 California and nationwide to Plaintiff and the Class was and is likely to deceive reasonable  
23 consumers by obfuscating the true composition and nature of Defendants Misbranded Food  
24 Products in violation of the "misleading prong" of California Business and Professions Code §  
25 17500, *et seq.*

26           122. As a result of Defendants' violations of the "misleading prong" of California  
27 Business and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the  
28 expense of Plaintiff and the Class. Misbranded products cannot be legally sold or held and are

1 legally worthless. Plaintiff and the Class paid a premium price for the Misbranded Food  
2 Products.

3 123. Plaintiff and the Class, pursuant to Business and Professions Code § 17535, are  
4 entitled to an order enjoining such future conduct by Defendants, and such other orders and  
5 judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any  
6 money paid for Defendants' Misbranded Food Products by Plaintiff and the Class.

7 **FIFTH CAUSE OF ACTION**  
8 **Business and Professions Code § 17500, *et seq.***  
9 **Untrue Advertising**

10 124. Plaintiff incorporates by reference each allegation set forth above.

11 125. Plaintiff asserts this cause of action against Defendants for violations of California  
12 Business and Professions Code § 17500, *et seq.*, regarding untrue advertising.

13 126. Defendants sold Misbranded Food Products in California and the United States  
14 during the Class Period.

15 127. Defendants engaged in a scheme of offering Defendants' Misbranded Food  
16 Products for sale to Plaintiff and the Class by way of product packaging and labeling, and other  
17 promotional materials. These materials misrepresented and/or omitted the true contents and  
18 nature of Defendants' Misbranded Food Products. Defendants' advertisements and inducements  
19 were made in California and come within the definition of advertising as contained in Business  
20 and Professions Code §17500, *et seq.* in that the product packaging and labeling, and promotional  
21 materials were intended as inducements to purchase Defendants' Misbranded Food Products, and  
22 are statements disseminated by Defendants to Plaintiff and the Class. Defendants knew, or in the  
23 exercise of reasonable care should have known, that these statements were untrue.

24 128. In furtherance of their plan and scheme, Defendants prepared and distributed in  
25 California and nationwide via product packaging and labeling, and other promotional materials,  
26 statements that falsely advertise the composition of Defendants' Misbranded Food Products, and  
27 falsely misrepresented the nature of those products. Plaintiff and the Class were the intended  
28 targets of such representations and would reasonably be deceived by Defendants' materials.

129. Defendants' conduct in disseminating untrue advertising throughout California deceived Plaintiff and members of the Class by obfuscating the contents, nature and quality of Defendants' Misbranded Food Products in violation of the "untrue prong" of California Business and Professions Code § 17500.

130. As a result of Defendants' violations of the "untrue prong" of California Business and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the expense of Plaintiff and the Class. Misbranded products cannot be legally sold or held and are legally worthless. Plaintiff and the Class paid a premium price for the Misbranded Food Products.

131. Plaintiff and the Class, pursuant to Business and Professions Code § 17535, are entitled to an order enjoining such future conduct by Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Food Products by Plaintiff and the Class.

**SIXTH CAUSE OF ACTION**  
**Consumers Legal Remedies Act, Cal. Civ. Code §1750, et seq.**

132. Plaintiff incorporates by reference each allegation set forth above.

133. This cause of action is brought pursuant to the CLRA. This cause of action does not currently seek monetary damages and is limited solely to injunctive relief. Plaintiff intends to amend this Complaint to seek damages in accordance with the CLRA after providing Defendants with notice pursuant to Cal. Civ. Code § 1782.

134. At the time of any amendment seeking damages under the CLRA, Plaintiff will demonstrate that the violations of the CLRA by Defendants were willful, oppressive and fraudulent, thus supporting an award of punitive damages.

135. Consequently, Plaintiff and the Class will be entitled to actual and punitive damages against Defendants for their violations of the CLRA. In addition, pursuant to Cal. Civ. Code § 1782(a)(2), Plaintiff and the Class will be entitled to an order enjoining the above-described acts and practices, providing restitution to Plaintiff and the Class, ordering payment of costs and attorneys' fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal. Civ. Code § 1780.

1           136. Defendants' actions, representations and conduct have violated, and continue to  
2 violate the CLRA, because they extend to transactions that are intended to result, or which have  
3 resulted, in the sale of goods to consumers.

4           137. Defendants sold Misbranded Food Products in California during the Class Period.

5           138. Plaintiff and members of the Class are "consumers" as that term is defined by the  
6 CLRA in Cal. Civ. Code §1761(d).

7           139. Defendants' Misbranded Food Products were and are "goods" within the meaning  
8 of Cal. Civ. Code §1761(a).

9           140. By engaging in the conduct set forth herein, Defendants violated and continue to  
10 violate Sections 1770(a)(5) of the CLRA, because Defendants' conduct constitutes unfair  
11 methods of competition and unfair or fraudulent acts or practices in that they misrepresent the  
12 particular ingredients, characteristics, uses, benefits and quantities of the goods.

13           141. By engaging in the conduct set forth herein, Defendants violated and continue to  
14 violate Section 1770(a)(7) of the CLRA, because Defendants' conduct constitutes unfair methods  
15 of competition and unfair or fraudulent acts or practices in that they misrepresent the particular  
16 standard, quality or grade of the goods.

17           142. By engaging in the conduct set forth herein, Defendants violated and continue to  
18 violate Section 1770(a)(9) of the CLRA, because Defendants' conduct constitutes unfair methods  
19 of competition and unfair or fraudulent acts or practices in that they advertise goods with the  
20 intent not to sell the goods as advertised.

21           143. By engaging in the conduct set forth herein, Defendants have violated and  
22 continue to violate Section 1770(a)(16) of the CLRA, because Defendants' conduct constitutes  
23 unfair methods of competition and unfair or fraudulent acts or practices in that they represent that  
24 a subject of a transaction has been supplied in accordance with a previous representation when it  
25 has not.

26           144. Plaintiff requests that the Court enjoin Defendants from continuing to employ the  
27 unlawful methods, acts and practices alleged herein pursuant to Cal. Civ. Code § 1780(a)(2). If  
28

1 Defendants are not restrained from engaging in these practices in the future, Plaintiff and the  
2 Class will continue to suffer harm.

3 **SEVENTH CAUSE OF ACTION**  
4 **Restitution Based on Unjust Enrichment/Quasi-Contract**

5 145. Plaintiff incorporates by reference each allegation set forth above.

6 146. As a result of Defendants' fraudulent and misleading labeling, advertising,  
7 marketing and sales of Defendants' Misbranded Food Products Defendants were enriched at the  
8 expense of Plaintiff and the Class.

9 147. Defendants sold Misbranded Food Products to Plaintiff and the Class that were not  
10 capable of being sold or held legally and which were legally worthless. It would be against  
11 equity and good conscience to permit Defendants to retain the ill-gotten benefits they received  
12 from Plaintiff and the Class, in light of the fact that the products were not what Defendants  
13 purported them to be. Thus, it would be unjust and inequitable for Defendants to retain the  
14 benefit without restitution to Plaintiff and the Class of all monies paid to Defendants for the  
15 products at issue.

16 148. As a direct and proximate result of Defendants' actions, Plaintiff and the Class  
17 have suffered damages in an amount to be proven at trial.

18 **EIGHTH CAUSE OF ACTION**  
19 **Beverly-Song Act (Cal. Civ. Code § 1790, et seq.)**

20 149. Plaintiff incorporates by reference each allegation set forth above.

21 150. Plaintiff and members of the Class are "buyers" as defined by Cal. Civ. Code §  
22 1791(b).

23 151. Defendants are "manufacturers" and "sellers" as defined by Cal. Civ. Code §  
24 1791(j) & (l).

25 152. Defendants' food products are "consumables" as defined by Cal. Civ. Code §  
26 1791(d).

27 153. Defendants' nutrient and health content claims constitute "express warranties" as  
28 defined by Cal. Civ. Code § 1791.2.

154. Defendants, through their package labels, create express warranties by making the affirmation of fact and promising that their Misbranded Food Products comply with food labeling regulations under federal and California law.

155. Despite Defendants' express warranties regarding their food products, they do not comply with food labeling regulations under federal and California law.

156. Defendants breached their express warranties regarding their Misbranded Food Products in violation of Cal. Civ. Code § 1790, *et seq.*

157. Defendants sold Plaintiff and members of the Class Defendants' Misbranded Food Products that were not capable of being sold or held legally and which were legally worthless.

158. As a direct and proximate result of Defendants' actions, Plaintiff and the Class have suffered damages in an amount to be proven at trial pursuant to Cal. Civ. Code § 1794.

159. Defendants' breaches of warranty were willful, warranting the recovery of civil penalties pursuant to Cal. Civ. Code § 1794.

**NINTH CAUSE OF ACTION**  
**Magnuson-Moss Act (15 U.S.C. § 2301, *et seq.*)**

160. Plaintiff incorporates by reference each allegation set forth above.

161. Plaintiff and members of the Class are "consumers" as defined by 15 U.S.C. § 2301(3).

162. Defendants are "suppliers" and "warrantors" as defined by 15 U.S.C. § 2301(4) & (5).

163. Defendants' food products are "consumer products" as defined by 15 U.S.C. § 2301(1).

164. Defendants' nutrient and health content claims constitute "express warranties."

165. Defendants, through their package labels, create express warranties by making the affirmation of fact and promising that their Misbranded Food Products comply with food labeling regulations under federal and California law.

166. Despite Defendants' express warranties regarding their food products, they do not comply with food labeling regulations under federal and California law.



1           167. Defendants breached their express warranties regarding their Misbranded Food  
2 Products in violation of 15 U.S.C. §§ 2301, *et seq.*

3           168. Defendants sold Plaintiff and members of the Class Misbranded Food Products  
4 that were not capable of being sold or held legally and which were legally worthless.

5           169. As a direct and proximate result of Defendants' actions, Plaintiff and the Class  
6 have suffered damages in an amount to be proven at trial.

7                                   **JURY DEMAND**

8           Plaintiff hereby demands a trial by jury of his claims.

9                                   **PRAYER FOR RELIEF**

10           WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, and on  
11 behalf of the general public, prays for judgment against Defendants as follows:

12           A.     For an order certifying this case as a class action and appointing Plaintiff and his  
13 counsel to represent the Class;

14           B.     For an order awarding, as appropriate, damages, restitution or disgorgement to  
15 Plaintiff and the Class for all causes of action other than the CLRA, as Plaintiff does not seek  
16 monetary relief under the CLRA, but intends to amend his Complaint to seek such relief;

17           C.     For an order requiring Defendants to immediately cease and desist from selling  
18 their Misbranded Food Products listed in violation of law; enjoining Defendants from continuing  
19 to market, advertise, distribute, and sell these products in the unlawful manner described herein;  
20 and ordering Defendants to engage in corrective action;

21           D.     For all equitable remedies available pursuant to Cal. Civ. Code § 1780;

22           E.     For an order awarding attorneys' fees and costs;

23           F.     For an order awarding punitive damages;

24           G.     For an order awarding pre-and post-judgment interest; and

25           ///

26           ///

27           ///

28

H. For an order providing such further relief as this Court deems proper.

Dated: May 4, 2012

Respectfully submitted,

Ben F. Pierce Gore

Ben F. Pierce Gore (SBN 128515)  
PRATT & ASSOCIATES  
1901 S. Bascom Avenue, Suite 350  
Campbell, CA 95008  
Telephone: (408) 429-6506  
Fax: (408) 369-0752  
[pgore@prattattorneys.com](mailto:pgore@prattattorneys.com)

Jay Nelkin  
Carol Nelkin  
Stuart M. Nelkin  
NELKIN & NELKIN, P.C.  
5417 Chaucer Drive  
Houston, Texas 77005  
Telephone: (713) 526-4500  
Facsimile: (281) 825-4161  
[jnelkin@nelkinpc.com](mailto:jnelkin@nelkinpc.com)  
[cnelkin@nelkinpc.com](mailto:cnelkin@nelkinpc.com)  
[snelkin@nelkinpc.com](mailto:snelkin@nelkinpc.com)

Don Barrett  
David McMullan, Jr.  
Brian Herrington  
Katherine B. Riley  
BARRETT LAW GROUP, P.A.  
P.O. Box 927  
404 Court Square North  
Lexington, MS 39095  
Telephone: (662) 834-2488  
Toll Free: (877) 816-4443  
Fax: (662) 834-2628  
[dbarrett@barrettlawgroup.com](mailto:dbarrett@barrettlawgroup.com)  
[donbarrett@barrettlawgroup.com](mailto:donbarrett@barrettlawgroup.com)  
[bherrington@barrettlawgroup.com](mailto:bherrington@barrettlawgroup.com)  
[kbripley@barrettlawgroup.com](mailto:kbripley@barrettlawgroup.com)  
[kbripley@yahoo.com](mailto:kbripley@yahoo.com)  
[dmcmullan@barrettlawgroup.com](mailto:dmcmullan@barrettlawgroup.com)

Charles Barrett  
CHARLES BARRETT, P.C.  
6518 Hwy. 100, Suite 210  
Nashville, TN 37205  
Telephone: (615) 515-3393  
Fax: (615) 515-3395  
[charles@cfbfirm.com](mailto:charles@cfbfirm.com)

1 Richard Barrett  
2 LAW OFFICES OF RICHARD R. BARRETT, PLLC  
3 2086 Old Taylor Road, Suite 1011  
4 Oxford, MS 38655  
5 Telephone: (662) 380-5018  
6 Fax: (866) 430-5459  
7 [rrb@rrblawfirm.net](mailto:rrb@rrblawfirm.net)

8 J. Price Coleman  
9 COLEMAN LAW FIRM  
10 1100 Tyler Avenue, Suite 102  
11 Oxford, MS 38655  
12 Telephone: (662) 236-0047  
13 Fax: (662) 513-0072  
14 [colemanlawfirm@bellsouth.net](mailto:colemanlawfirm@bellsouth.net)

15 Dewitt M. Lovelace  
16 Alex Peet  
17 LOVELACE LAW FIRM, P.A.  
18 12870 U.S. Hwy 98 West, Suite 200  
19 Miramar Beach, FL 32550  
20 Telephone: (850) 837-6020  
21 Fax: (850) 837-4093  
22 [dml@lovelacelaw.com](mailto:dml@lovelacelaw.com)

23 David Shelton  
24 ATTORNEY AT LAW  
25 1223 Jackson Avenue East, Suite 202  
26 Oxford, MS 38655  
27 Telephone: (662) 281-1212  
28 Fax: (662) 281-1312  
[david@davidsheltonpllc.com](mailto:david@davidsheltonpllc.com)

Keith M. Fleischman  
Frank Karam  
Ananda N. Chaudhuri  
FLEISCHMAN LAW FIRM  
565 Fifth Avenue, 7<sup>th</sup> Floor  
New York, New York 10017  
Telephone: 212-880-9571  
[keith@fleischmanlawfirm.com](mailto:keith@fleischmanlawfirm.com)  
[frank@fkaramlaw.com](mailto:frank@fkaramlaw.com)  
[achaudhuri@fleischmanlawfirm.com](mailto:achaudhuri@fleischmanlawfirm.com)

Zona Jones  
PROVOST UMPHREY LAW FIRM LLP  
490 Park Street  
P.O. Box 4905  
Beaumont, TX 77704  
Telephone: (409) 299-5178  
[zjones@provostumphrey.com](mailto:zjones@provostumphrey.com)

*Attorneys for Plaintiff*